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Will Rule 401(b) Ever Be Predictable

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WILL RULE 404(b) EVER BE PREDICTABLE?

I. INTRODUCTION

On July 16, 2015, Wesley McCoy ("McCoy") was convicted of second-degree murder, brandishing a weapon, and destruction of property.[1] The court denied McCoy's motion for post-trial judgment of acquittal, and he was sentenced to 40 years imprisonment for second-degree murder, one year for brandishing, and one year for the destruction of property—McCoy appealed.[2] On August 19, 2014, McCoy and his girlfriend, Brittney Clark ("Clark"), got into a domestic dispute that resulted in McCoy leaving her home.[3] After the dispute, Clark asked a friend to accompany her to McCoy's home to pick up her

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1 State v. McCoy, No. 15-1142, 2016 WL 6651585, at *1 (W. Va. 2016).

2 *Id.*

3 *Id.*

belongings.[4] Clark and four others, including the victim, Justin Buell ("Buell"), headed to McCoy's.[5] Upon arriving, Clark and her friends found McCoy and another man sitting on the porch.[6] Two of Clark's friends entered the home to retrieve her belongings.[7] During this time, McCoy and Buell, who were waiting outside on the porch, argued about the situation that ultimately escalated to a small scuffle.[8] After a short exchange of punches, the two men briefly separated.[9] McCoy then brandished a knife and approached Buell.[10] After another short quarrel, McCoy stabbed Buell in the neck, fatally killing him.[11]

During the trial, the State sought to introduce prior bad act evidence of a previous altercation McCoy was involved in.[12] Six years prior, in 2008, McCoy was involved in an altercation which ended with McCoy stabbing the provocateur.[13] While working at a gas station, McCoy was approached by a Travis Farris ("Farris") who dated McCoy's girlfriend.[14] Farris then physically assaulted McCoy, who defended himself by pulling out a knife and stabbing Farris several times.[15] After investigating the stabbing, police found that McCoy acted in self-defense and he was not charged for this conduct.[16]

The prosecution argued the prior bad act evidence was relevant in finding McCoy's intent, his state of mind, and whether he acted with absence of mistake.[17] Additionally, the prosecution sought to use the evidence to rebut McCoy's defense that he suffered a diminished capacity.[18] Over McCoy's objection, the trial court permitted the jury to hear evidence of the 2008 stabbing.[19]

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4 *Id.*

5 *Id.*

6 *Id.* McCoy claimed self-defense because he and his friend were "minding [their] own business and drinking on [McCoy's] own porch." *Id.* at *2. The Court did not accept his argument and ultimately refused to grant a self-defense instruction. *See id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at *3–4.

13 *Id.* at *3.

14 *Id.*

15 *Id.*

16 *Id.* at n.5. McCoy was subsequently charged with carrying a concealed deadly weapon in connection with the 2008 stabbing. *Id.*

17 *Id.* at *3.

18 *Id.*

19 *Id.*

The Supreme Court of Appeals of West Virginia held that the trial court did not err in admitting the evidence because the probative value of the stabbing was not outweighed by the prejudicial effect of its introduction.[20] The Court found that the evidence of the previous stabbing could prove that McCoy "intended to respond to a fist fight with knife violence and . . . that using a knife under such circumstances could cause serious or deadly harm."[21] The Court held that the prejudicial value was low because the 2008 stabbing was an act of self-defense[22] "thereby limiting any element of 'malice' that the jury may have presumed."[23]

In the dissent, then Chief Justice Ketchum thought that the majority misapplied Rule 404(b): "evidence of petitioner's use of a knife years earlier to defend himself from an unprovoked assault at his place of employment should not have been admitted under Rule 404(b) to show intent or absence of mistake in this case."[24] The Chief Justice felt that the circumstances between the prior stabbing and the subsequent stabbing were "in no way similar" to each other.[25] Further, he felt the evidence was not only irrelevant but "probative of nothing."[26] Under this analysis, if the evidence is truly probative of nothing, then evidence of any prejudicial value would violate Rule 403. Furthermore, the Chief Justice was concerned about the Court's willingness to allow Rule 404(b) evidence because this evidence is "in practice, simply a way for prosecutors to show that the defendant is a bad person and, therefore, guilty."[27] The dissent highlights what many consider to be the biggest concern with admitted Rule 404(b) evidence—that the jury will misuse the evidence to find the defendant guilty, absent otherwise incriminating evidence.[28]

The impetus for this Note came from my evidence class with Professor Marjorie McDiarmid. During which she highlighted the positive steps the Supreme Court of Appeals of West Virginia has taken to safeguard prior bad act evidence under Rule 404(b), departing from both the federal interpretation and the majority of states who adopted such interpretation. The Supreme Court of

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20 *Id.* at *4.

21 *Id.*

22 On appeal, McCoy's first assignment of error argued that the trial court erred in not giving the jury a self-defense jury instruction. *Id.* at *1. He argued that he was entitled to the instruction because such instruction is proper when he "presents any evidence supporting that defense, regardless of the weakness or strength of that evidence." *Id.* at *2 (quoting State v. McCoy, 632 S.E.2d 70, 75 (W. Va. 2006)) (the defendant in the cited case bears no relation to Wesley McCoy).

23 *Id.* at *4.

24 *Id.* at *6 (Ketchum, C.J., dissenting).

25 *Id.*

26 *Id.*

27 *Id.*

28 *See id.*; JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 58.2 (3d ed. 1940).

Appeals, rather, took steps for a rule that better protects adverse parties to such evidence; however, one cannot ignore that rules and interpretations are subject to change over the years.

This Note revisits over 30 years of jurisprudence and commentary regarding Rule 404(b) evidence,[29] and advocates that courts must be more critical of prior bad act evidence, limiting its use to valid, fair, and nonprejudicial purposes to preserve a party's right to a fair trial. Although this Note will critically examine numerous cases that included prior bad act evidence, it is not the intention of this Note to point fingers at judges or blame them for the outcomes. Instead, this Note will proffer a more hardline rule that can be easily applied, creating more predictability for judges, attorneys, and defendants alike.

Part II will provide the jurisprudential history of prior bad acts under Rule 404(b) and how it is unique only to West Virginia and a handful of other states. Most of West Virginia's development of case law occurred shortly following the Supreme Court of the United States' own progeny of Rule 404(b) cases. Part II of this Note will also look to how other states, departing from *Huddleston v. United States*,[30] have applied Rule 404(b) to prior bad act evidence.

Part III will look to how West Virginia's unique application of Rule 404(b) withstood challenges over the last 20 years. Part III.A will begin by addressing why the time has come to amend the rule. Part III.B will look to the Chicago Jury Project—a long term sociological study of American juries. Part III.C.1 will look back at *McCoy* and how the trial court addressed the admission of prior bad act evidence. Then, Part III.D will provide several methods the rule could use to effect change for the better. First, Part III.D.1 will look to amend Rule 403 and break it up into a Rule 403(a) and (b). Next, Part III.D.2 will introduce a second method through which the Rules of Evidence could be modified to better protect defendants from the introduction of prior bad act evidence.

II. BACKGROUND

This Part will start off by discussing the Chicago Jury Project—experiments conducted at the University of Chicago to explore the dynamic of American juries. Next, Part II will describe how the West Virginia Rules of Evidence have been interpreted in West Virginia over the past 30 years. Part II.A will also highlight the differences between how the Supreme Court of Appeals of West Virginia and the Supreme Court of the United States have differed in their interpretations of Rule 404(b). Part II.B will look to how other states have

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[29] Most of the commentary referenced in this Note discusses the Federal Rules of Evidence; however, many of the same principles are universal throughout all jurisdictions that have adopted all, or most, of the pertinent sections of Rule 404.

[30] 485 U.S. 681 (1988).

addressed Rule 404(b). Furthermore, Part II.B will discuss the benefits of each state's chosen path. Part II.C will look to the current state of Rule 404(b) in West Virginia and how the rule has held up after 25 years. Finally, Part II.D will briefly discuss the enactment and origins of Rule 404(b), prior bad act evidence. Additionally, Part II.D will discuss various reasons commentators and courts have expressed views for amending Rule 404(b).

During the 1950s, the University of Chicago conducted social experiments that analyzed various factors and their effect on American juries.[31] The study was led by Harry Kalven,[32] Hans Zeisel,[33] and Fred Strodtbeck.[34] The study included statistical data on nearly 100 mock criminal trials held on either burglary or incest charges.[35] Additionally, the survey also included over 3500 trial questionnaires from trial judges.[36] One of the many factors the researchers sought to determine was the impact prior bad act evidence had on a jury's finding of guilt.[37] The researchers found that conviction rates were significantly higher when the jury learned that the defendant had a criminal record, regardless of the severity of the crime.[38] Furthermore, the researchers concluded that a jury that heard prior bad act evidence approached determining the defendant's guilt in a drastically different way than a jury who had not.[39] In 1966, the researchers published *The American Jury*, a detailed account and compilation of the Chicago Jury Project.[40] Several decades after the Chicago Jury Project was completed, courts still struggle with when prior bad act evidence should be admitted.

Like West Virginia's Rule 404(b), Rule 404(b) of the Federal Rules of Evidence is a rule that prohibits a party from admitting prior bad act evidence

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31 *Chicago Jury Project*, CRIM. JUST., http://criminal-justice.iresearchnet.com/forensic-psychology/chicago-jury-project/ (last visited Sept. 9, 2018).

32 Harry Kalven was a professor of law at the University of Chicago and was regarded as the leader of the Chicago Jury Project. Edward H. Levi, *Harry Kalven Jr.*, 43 U. CHI. L. REV. 1, 2 (1975).

33 Hans Zeisel was a professor of law and sociology at the University of Chicago. *Guide to the Hans Zeisel Papers 1925–1992*, U. CHI. LIBR., https://www.lib.uchicago.edu/e/scrc/findingaids/view.php?eadid=ICU.SPCL.ZEISELH (last visited Sept. 9, 2018). His research was primarily focused on the law and social sciences. *Id.*

34 *Fred Strodtbeck, Social Psychologist, 1919–2005*, U. CHI. NEWS OFF. (Aug. 17, 2005), http://www-news.uchicago.edu/releases/05/050819.strodtbeck.shtml; *Chicago Jury Project*, *supra* note 31.

35 *Chicago Jury Project*, *supra* note 31.

36 *Id.*

37 Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rule of Evidence*, 30 VILL. L. REV. 1465, 1487 (1985) [hereinafter *The Need to Amend*].

38 *Id.*

39 *Id.*

40 HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

"to show that on a particular occasion the person acted in accordance with the character."[41] The rule intends to restrict occasions of a party's prior bad acts from going before the fact-finder, fearing that a jury might feel inclined to punish the party for a prior, unrelated act, rather than for the conduct at issue.[42] Although applicable in both criminal and civil cases, the rule is most often used in criminal cases where the prosecution wishes to introduce evidence of the defendant's prior crimes or acts to show that the defendant is likely to have recidivated; however, this use is strictly prohibited.[43]

Rule 404(b) allows a party to admit such evidence if intended for other purposes such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[44] This non-exhaustive list of permitted purposes allows the introduction of evidence solely to prove the party has previously committed a crime, wrong, or other act that could be helpful for the jury in its fact-finding role. Unlike a confession, prior bad act evidence is sometimes called dual purpose evidence—that is, not only can Rule 404(b) evidence be used to show motive or intent, it also can be used by the jury to make the "once a crook, always a crook" reference.[45]

A. Stepping Away from the Majority: West Virginia's Stricter Approach to Prior Bad Act Evidence

Since 1985, when West Virginia implemented the Rules of Evidence, West Virginia's Rules 404 and 104 have remained nearly identical versions of their federal counterparts.[46] Like many other jurisdictions, West Virginia's courts have struggled with applying Rule 404(b) to the near infinite amount of purposes for which a party may wish to introduce a crime, wrong, or other act.[47] The Supreme Court of Appeals of West Virginia, in *State v. Dolin*,[48] stated that all evidence offered to the jury under Rule 404(b) must first be proven to the trial court by clear and convincing evidence before being admitted into evidence.[49]

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41 FED. R. EVID. 404(b).

42 GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY 156 § 404.12 (7th ed. 2014).

43 *Id.*

44 FED. R. EVID. 404(b)(2).

45 *The Need to Amend*, *supra* note 37, at 1487.

46 *Compare Rules of Evidence*, W. VA. LEGISLATURE, http://www.legis.state.wv.us/WVCODE/MagRules_htm/RULES%20OF%20EVIDENCE.htm, *with* W. VA. R. EVID. 404, 104.

47 State v. McGinnis, 455 S.E.2d 516 (W. Va. 1994).

48 State v. Dolin, 347 S.E.2d 208 (W. Va. 1986).

49 *Id.* at Syl. Pt. 5.

The Court in *Dolin* had little reason not to adopt this standard given its wide acceptance among other jurisdictions.[50]

Until the Supreme Court decided *Huddleston v. United States*, jurisdictions were divided over whether Rule 404(b) required a trial court to make a preliminary finding by a preponderance of the evidence, clear and convincing evidence, or the less restrictive "sufficient evidence to support a finding by the jury" standard.[51] In *Huddleston*, the defendant was charged with, among other related crimes, one count of possession of stolen property in interstate commerce.[52] At trial, the government introduced two pieces of prior bad act evidence.[53] The first piece of evidence was testimony from a local record store owner.[54] The store owner testified that the defendant had sold him dozens of televisions and allegedly could obtain several thousand more.[55] The second piece of prior bad act evidence was testimony from an undercover FBI agent who posed as a buyer for an appliance store.[56] The agent testified that the defendant had offered to sell him a large amount of kitchen appliances well below market value.[57] The district court admitted the two prior bad acts, and the defendant was convicted.[58]

The Court of Appeals for the Sixth Circuit reversed the conviction stating that evidence should not be admitted absent "clear and convincing evidence."[59] The government petitioned for rehearing and asked the court to consider the recently decided *United States v. Ebens*,[60] where a different panel on the Sixth Circuit flopped, now requiring that the proponent of prior bad act evidence must prove by a preponderance of the evidence that the defendant performed the bad act.[61] On rehearing, the Sixth Circuit applied the "preponderance of the evidence" standard and found that the district court did not abuse its discretion and affirmed the conviction.[62]

The Supreme Court reversed, finding that not only was the preponderance of the evidence standard wrong, but that the district court

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50 *Id.* at 215.

51 Huddleston v. United States, 485 U.S. 681, 685 (1988).

52 *Id.* at 682.

53 *Id.* at 683.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 684.

59 *Id.*

60 800 F.2d 1422 (6th Cir. 1986).

61 *Id.* at 1432.

62 United States v. Huddleston, 811 F.2d 974, 975 (6th Cir. 1987).

misapplied that standard.[63] Furthermore, the Court held that a district court must only determine "if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."[64] The Court stated that, unlike Rule 403 and 402, Rule 404(b) does not require a preliminary showing before such evidence may be introduced; rather, "[i]f offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility."[65] By following Rule 104(b), instead of Rule 104(a)'s requirement that a court make a preliminary finding, the petitioner was concerned that this standard permits evidence to be admitted that is less about proving motive, opportunity, or other permitted purposes and more about convincing the jury that the defendant's priors actions indicate the defendant's guilt to the alleged act.[66] This is often called the propensity inference. Addressing this concern, the Supreme Court stated that despite not acting as the gatekeeper for Rule 404(b) evidence, proper application of the rules will safeguard the defendant from improper Rule 404(b) evidence being introduced.[67] Furthermore, the Court believes that defendants are protected by four requirements:

> [F]irst, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, . . . and fourth, from [Rule] 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.[68]

In 1992, the Supreme Court of Appeals of West Virginia was given the opportunity, in *TXO Production Corp. v. Alliance Resources Group*,[69] to depart from *Dolin*'s "clear and convincing evidence" standard and follow the Supreme Court's holding in *Huddleston*. Taken nearly verbatim, the Supreme Court of Appeals adopted *Huddleston*'s holding, requiring only that "such evidence should be admitted if there is sufficient evidence to support a finding by the jury

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63 Huddleston v. United States, 485 U.S. 681, 685 (1988).

64 *Id.*

65 *Id.* at 688.

66 *Id.* at 691.

67 *Id.* at 691–92.

68 *Id.*

69 419 S.E.2d 870 (W. Va. 1992).

that the defendant committed the similar act."[70] Furthermore, the Supreme Court of Appeals of West Virginia agreed with the Supreme Court's finding of adequate protections of admitting improper evidence incorporated into Rule 404(b) to be sufficient;[71] however, the Supreme Court of Appeals failed to explicitly overrule its previous holding in *Dolin* requiring that the judge decide whether the evidence met the clear and convincing standard.[72] In 1994, the Supreme Court of Appeals of West Virginia finally reconciled the conflict between *Dolin*'s clear and convincing evidence standard with *TXO Productions* recent adoption of only requiring the judge to find "sufficient evidence to support a finding" before allowing a jury to make the final determination.[73]

In *State v. McGinnis*,[74] the Supreme Court of Appeals of West Virginia reviewed the admissibility of prior bad act evidence which led to a conviction of first-degree murder. The facts of *McGinnis* are typical for cases that result in Rule 404(b) challenges. On this night, the body of Kathy McGinnis was found behind a shopping center.[75] Her body was found with a plastic bag over her head, secured with a piece of telephone wire.[76] The next day, the defendant was found in Kentucky beside his wrecked vehicle with telephone cord wrapped around his neck, wrist, and ankles.[77] After hearing the defendant's recollection of the events, and finding his story unconvincing, the police declared the defendant the prime suspect.[78]

While police were investigating the murder of Kathy McGinnis, police were working on another investigation involving the embezzlement of six million dollars from the Nighbert Land Company.[79] At the grand jury proceedings, the prosecution presented evidence for both the first-degree murder of Kathy McGinnis and embezzlement charges—the grand jury returned an indictment for both charges.[80] Shortly after the indictment, the defendant severed the charges for trial.[81] During the murder trial, the prosecution "spent a substantial portion of the opening and three full days of its case discussing

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70 *Id.* at 883 (quoting *Huddleston*, 485 U.S. at 685).

71 *Id.* at 883–84.

72 *See* State v. McGinnis, 455 S.E.2d 516 (W. Va. 1994).

73 *Id.* at 526.

74 455 S.E.2d 516 (W. Va. 1994).

75 *Id.* at 520.

76 *Id.*

77 *Id.* at 521.

78 *Id.*

79 *See id.* at 522.

80 *Id.*

81 *Id.*

collateral crimes evidence."[82] The remainder of the prosecution's case included references to the collateral crimes.[83] The prosecution intended to establish that the defendant had a motive to kill his wife.[84]

During the trial, 15 of the prosecution's witnesses testified solely about the collateral crimes.[85] Even in closing arguments, the prosecution relied heavily on the collateral crimes: "Mr. McGinnis was a suspect immediately in this [murder] case because he was at the time of the death being investigated for arson, tax evasion, embezzlement, and mail fraud, and his wife was found dead. Use reason and common sense to determine why he was immediately a suspect."[86] The trial court admitted the evidence using the Rule 104(b) recently adopted in *TXO Productions*.[87] The jury found the defendant guilty of first-degree murder.[88]

The Court in *McGinnis* reconciled the conflict created with the adoption of *Huddleston* in *TXO Productions* and the "clear and convincing" standard from *Dolin*.[89] Further, Justice Cleckley found it necessary to modify the holding in *TXO Productions* to require first, that the trial court determine "by a preponderance of the evidence that the acts were committed and that the defendant committed them.[90] Permitting the jury to hear such testimony before such a finding was made, as proscribed by 104(b), would subject the defendant "to an unfair risk of conviction regardless of the jury's ultimate determination of these facts."[91] Justice Cleckley intended this new standard to apply to all cases, both criminal and civil, despite the opinion's exclusive use of "prosecution."[92]

The Court reasoned that absent specific guidance in the Rules of Evidence on Rule 404(b), a court should follow the "beyond a preponderance of

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82 *Id.* at 528.

83 *Id.* at 529.

84 *Id.*

85 *Id.*

86 *Id.* at 529–30 (alteration in original).

87 *Id.* at 526.

88 *Id.* at 522.

89 *Id.* at 526.

90 *Id.* at 527.

91 *Id.*

92 *Id.* at 523 n.6.

> By using the "prosecution" as the subject of our discussion, we do not mean to imply that the application of Rule 404(b) of the West Virginia Rules of Evidence is limited to criminal cases. Although we apply it more often in the criminal context, we also apply it to civil cases. Similarly, Rule 404(b) evidence is equally available to a defendant in a criminal case. The standards that we discuss for the admission of Rule 404(b) evidence in criminal cases when offered by the prosecution apply to all cases.

Id. (internal citation omitted).

the evidence" standard already used when determining the admissibility of evidence such as confessions.[93] Under this new standard, the Court decided that the trial court should act as a gatekeeper for evidence sought to be admitted.[94] In *McGinnis*, Justice Cleckley was persuaded by the Colorado Supreme Court's reasoning in *People v. Gardner*,[95] "'[g]iven the clearly recognized potential for prejudice inherent in other-crime evidence, its seems more reasonable to us . . . to require the trial court to be satisfied by a preponderance of the evidence of the conditionally relevant facts before permitting' the jury to hear them."[96] Additionally, the Supreme Court of Appeals of West Virginia adopted Colorado's requirement that only after a trial court is satisfied that the evidence has been proven by a preponderance of the evidence, should a court further consider whether the evidence is admissible under Rules 401, 402, and 403.[97]

B. Remaining in the Minority: How Other State Courts Apply Rule 404(b)

Unlike West Virginia, many states have sided with the Supreme Court's holding in *Huddleston*.[98] However, states such as Colorado, New Hampshire, and Ohio have chosen not to follow *Huddleston*.[99] New Hampshire established a three prong test in *State v. Barker*[100] to determine whether to admit prior bad act evidence.[101] Under *Barker*, the court requires "evidence [to be] relevant for a purpose other than showing the character or disposition of the defendant, that the proof that the acts in question were committed by the defendant is clear, and that the probative value of the evidence outweighs the danger of prejudice to the

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93 *Id.* at 526; *see* State v. Farley, 452 S.E.2d 50 (W. Va. 1994) (supporting the court's discussion in *State v. Clark*, 297 S.E.2d 849 (W. Va. 1982), on the duty of the court to make a finding of fact and law for some types of evidence before the evidence may be put forth to a jury).

94 *McGinnis*, 455 S.E.2d at 527.

95 People v. Garner, 806 P.2d 366 (Colo. 1991).

96 *McGinnis*, 455 S.E.2d at 527 (quoting *Garner*, 806 P.2d at 372 n.4).

97 *Id.* at Syl. Pt. 2.

> If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence.

Id.

98 *See, e.g.*, Johnson v. United States, 683 A.2d 1087 (D.C. 1996); State v. Wright, 593 N.W.2d 792 (S.D. 1999); Vigil v. State, 926 P.2d 351 (Wyo. 1996).

99 *Garner*, 806 P.2d at 372; State v. Trainor, 540 A.2d 1236, 1238 (N.H. 1988); State v. Broom, 533 N.E.2d 682 (Ohio 1988).

100 374 A.2d 1179 (N.H. 1977).

101 *Id.* at 1180.

defendant."[102] This test, created pre-*Huddleston,* was applied again post-*Huddleston* in *State v. Trainor.*[103] The Court again held that a trial court must find "that there is clear proof that the defendant committed the prior offenses."[104] Throughout the entire *Trainor* opinion, the Court made no reference to *Huddleston.*[105] However, New Hampshire is not the only state to disregard *Huddleston.* In *State v. Broom,*[106] the Supreme Court of Ohio was silent on adopting *Huddleston* but, rather, requires "substantial proof" that the defendant committed the alleged similar act.[107]

The Colorado Supreme Court in *People v. Garner,*[108] as seen by the Supreme Court of Appeals of West Virginia's reliance on its holding in *McGinnis*, requires first that the judge apply Rule 104(a).[109] In *Garner*, the defendant was charged with first-degree murder after his wife was found strangled to death in her apartment.[110] During the trial, the prosecution offered evidence of two other strangulations resulting in death, both of whom were involved in intimate relationships with the defendant at the time.[111] The prosecution sought to introduce the prior bad act evidence to establish the identity of the defendant by way of his *modus operandi.*[112] The women in the prior two murders were found in similar positions, suffered similar injuries, and were killed shortly after announcing they wanted to break up with the defendant.[113] The trial court permitted the evidence to be admitted, finding that the evidence established the identity of the defendant as the perpetrator of the

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102 *Id.*

103 *Trainor*, 540 A.2d at 1238.

104 *Id.* at 1238.

105 *See id.*

106 State v. Broom, 533 N.E.2d 682 (Ohio 1988).

107 *Id.* at 690.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

OHIO R. EVID. 404(b).

108 806 P.2d 366 (Colo. 1991).

109 *See id.*; State v. McGinnis, 455 S.E.2d 516 (W. Va. 1994). The Colorado Supreme Court decided *Garner* in 1991, just three years before the Supreme Court of Appeals of West Virginia decided *McGinnis*.

110 *Garner*, 806 P.2d at 367.

111 *Id.*

112 *Id.*

113 *Id.* at 367–68.

prior two crimes by "clear and convincing evidence."[114] The defendant was convicted and sentenced to life imprisonment.[115]

The appellate court held that prior bad act evidence introduced must be established by clear and convincing evidence independently from "any other evidence in the case in determining whether the defendant's identity as the perpetrator of that other crime was adequately established."[116] The Supreme Court of Colorado granted certiorari to determine if the appellate court "employed the proper standards in resolving the admissibility of other-crime evidence."[117]

Several years after *Garner* and *McGinnis* were decided, the Arizona Supreme Court in *State v. Terrazas*,[118] joined these states who deviated from the Supreme Court of the United States. There, the court affirmed that prior bad acts should: (1) be proven by clear and convincing evidence, and (2) that the prior bad acts were committed by the defendant.[119] Like Colorado, West Virginia and other states that have modified its standard of admissibility, Arizona retained the four protective provisions the Supreme Court held in *Huddleston.*[120] Acknowledging that many states use varying standards of admissibility for prior bad act evidence, the Arizona Supreme Court shared similar concerns still present today:

> We believe there are important reasons to apply a clear and convincing standard, rather than some lesser standard, to evidence of prior bad acts. Such evidence is quite capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instructions from the judge.[121]

The early decisions by states like Arizona truly concerned with the risk of prior bad act evidence, repeatedly cautioned courts and counsel to "exercise extreme care in its use, even where it is admissible."[122]

In *Terrazas*, the defendant was suspected of stealing a car when police found miscellaneous car parts from the stolen vehicle on the defendant's

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114 *Id.* at 368.

115 *Id.*

116 *Id.* at 368–69.

117 *Id.* at 369.

118 State v. Terrazas, 944 P.2d 1194 (Ariz. 1997).

119 *Id.* at 1196.

120 *Id.* at 1197.

121 *Id.* at 1198.

122 *Id.*

property.[123] The defendant denied any involvement and knowledge of the theft.[124] During the bench trial, the State offered evidence of three other occasions the defendant was suspected of stealing a vehicle.[125] Ultimately, the court only considered two of the three other occasions.[126]

Terrazas differs from *Garner* and *McGinnis* because the prior bad act evidence did not affect the disposition of a jury against a defendant; rather, *Terrazas* was a bench trial and the court of appeals found that the trial judge had relied on the prior bad act evidence when determining the defendant's guilt by extending its permitted use past establishing whether motive or plan could be found.[127] The Court's finding in *Terrazas* shows that anyone, no matter the position, can be influenced by the highly prejudicial effects that prior bad act evidence can cause. Candidly, the purpose of this Note is not to accuse or blame judges for disregarding the proper use of Rule 404(b) evidence; rather, the purpose of this Note is to create a hardline rule to be applied by all judges with greater uniformity in all jurisdictions.

C. *Has McGinnis Withstood the Test of Time?*

Nearly 25 years after *McGinnis* was decided, Justice Cleckley's principles remain virtually untouched.[128] Within the last three years alone, the Supreme Court of Appeals has discussed Rule 404(b) issues over 70 times.[129] Recently, the Supreme Court of Appeals, in *State v. Zuccaro*,[130] reiterated the importance that courts must first make a preliminary determination that the prior bad act evidence is proven by a preponderance of the evidence,[131] that is, proven to be more likely than not, before allowing the evidence to be offered to the jury.[132]

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123 *Id.* at 1195.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.* at 1198.

128 W. VA. R. EVID. 404(b).

129 *See, e.g.*, State v. Spinks, 803 S.E.2d 558 (W. Va. 2017); State v. Zuccaro, 799 S.E.2d 559 (W. Va. 2017); Ballard v. Hunt, 772 S.E.2d 199 (W. Va. 2015).

130 799 S.E.2d 559 (W. Va. 2017).

131 The legal standard, by a preponderance of the evidence, is often the burden of persuasion in a civil case, as opposed to beyond a reasonable doubt, which is the burden of persuasion used in a criminal case. Some have described the preponderance of the evidence standard as something that is more likely than not, or when 51% or more of the evidence favors one side. Neil Orloff & Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159 (1983).

132 *Zuccaro*, 799 S.E.2d at 564.

In *Zuccaro*, the defendant sought to introduce evidence that the victim was a drug dealer and had illegally sold firearms.[133] This evidence was intended to show that the victim was involved in illegal and dangerous activities, and therefore, could have been killed by another person.[134] The Court denied the defendant from introducing this evidence because he "failed to provide credible evidence to show the victim was a drug dealer or had illegally sold guns or silencers."[135]

Further, the Court in *Zuccaro* reaffirmed its holding in *McGinnis* that evidence subject to a judge's preliminary determination is not limited to evidence offered by the prosecution, but applies to all evidence of "other acts" offered by any party.[136] The defendant unsuccessfully argued that the rule in *McGinnis* was based on policy considerations preventing a criminal defendant to face an "unfair risk of conviction."[137] Although this risk was a guiding consideration in *McGinnis*, the Court in *Zuccaro* conceded that the risk of prejudice is far less likely when the defendant offers collateral evidence against a third person, "the State nonetheless has a legitimate interest in avoiding the presentation of unreliable and false collateral evidence to the jury."[138] For the same reasons a jury could convict a defendant because of excessive prior bad acts, the Court stated that evidence of the victims bad acts could cause a jury to "ignore evidence showing guilt beyond a reasonable doubt because the victim was cast as a bad person who 'deserved what he got.'"[139]

Although a defendant has a valid defense to a first-degree murder charge by showing that another individual committed the murder, a defendant may not speculate that a victim's prior bad acts "could have exposed the victim to bad people who might have decided to kill him."[140] Once again, the Supreme Court of Appeals found guidance from the Colorado Supreme Court :

> The touchstone of relevance in this context is whether the alternate suspect evidence establishes a non-speculative connection or nexus between the alternate suspect and the crime charged. Where the evidence concerns other acts by the alternate

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133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.* at 573–74.

137 *Id.* at 573.

138 *Id.* (citing United States v. Scheffer, 523 U.S. 303, 309 (1998)) ("State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules.").

139 *Id.*

140 *Id.* at 570.

> suspect, a court must look to whether all the similar acts and circumstances, taken together, support a finding that the same person probably was involved in both the other act and the charged crime.[141]

D. A Long History of Dispute: The Need to Amend Rule 404(b)

Officially enacted in 1975, the Federal Rules of Evidence provided federal courts with the first set of uniform rules of evidence.[142] Not long after its enactment, many rules undertook substantive changes.[143] Like many of the originally enacted rules, Rule 404(b) is the codification of a pre-existing common law doctrine used by the courts. Rule 404(b) was commonly referred as the "uncharged misconduct doctrine" or the "doctrine of chances."[144] Since the Federal Rules have been enacted, Rule 404(b) has been the most litigated Rule of Evidence.[145] This is likely because of the "enormous increase in the use of extrinsic crime evidence" since the Federal Rules of Evidence were enacted.[146] Both before and after the Supreme Court decided *Huddleston*, commentators objected to Rule 404(b), noting fundamental flaws with its application.[147] Rule 404(b) has been criticized for its unworkable standards,[148] the risk the jury will make propensity inferences,[149] and placing the burden of demonstrating the evidence should be excluded on the defendant.[150]

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141 *Id.* at 574 (quoting People v. Elmarr, 351 P.3d 431, 438 (Colo. 2015)).

142 *FRE Legislative History Overview Resource Page*, FED. EVID. REV., http://federalevidence.com/legislative-history-overview (last visited Sept. 9, 2018).

143 *See id.* During that first year, five rules were amended. *Id.* In the first five years, one rule was added and two were amended. *Id.* By the end of 1987, nearly every Federal Rule of Evidence was amended. *Id.*

144 WIGMORE, *supra* note 28; *The Need to Amend*, *supra* note 37, at 1467; David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 116, 160–61 (2002). *See* Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 HOFSTRA L. REV. 851 (2017).

145 *The Need to Amend*, *supra* note 37, at 1467. *See* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775 (2013).

146 Abraham Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 EMORY L.J. 135, 142 (1989).

147 *See, e.g.*, *The Need to Amend*, *supra* note 37; Ordover, *supra* note 146; Edward Imwinkelried, *"Where There's Smoke, There's Fire": Should The Judge or The Jury Decide The Question of Whether The Accused Committed An Alleged Uncharged Crime Proffered Under Federal Rule of Evidence 404?*, 42 ST. LOUIS U. L.J. 813 (1998) [hereinafter *"Where There's Smoke"*]; Milich, *supra* note 145.

148 Milich, *supra* note 145, at 778; *"Where There's Smoke," supra* note 147, at 836.

149 Milich, *supra* note 145, at 785.

150 *The Need to Amend*, *supra* note 37, at 1465.

Those who think Rule 404(b) contains nearly unworkable standards are really highlighting how there is great disparity among courts in its application.[151] Some have cited that judges will favor the admittance of prior bad act evidence because the judge does not want the defendant to be viewed in a "false light."[152] Another reason commentators think that the rule is unworkable is because of the disparate treatment some courts give to Rule 404(b) evidence offered against the defendant with the evidence offered against the government.[153]

Another reason Rule 404(b) is often criticized is because of the risk the jury will make a propensity inference. A propensity inference suggests that "because the accused has a particular character trait he or she probably acted in conformity with that trait at the time in question and therefore . . . committed the crime charged."[154] This argument rests on the endless "proper" purposes Rule 404(b) provides.[155] Many fear that Rule 404(b) operates as a way for parties to skirt around the prohibitions of character evidence under Rule 404(a).[156] Furthermore, the argument exists that the wrong party is given the burden under 404(b)—that is the defendant is the party with the often higher burden of proving to the court that prior bad act evidence should be excluded.[157] At common law, the burden was always on the proponent to prove that the evidence should be admitted.[158] However, during legislative hearings of the federal rules, the Justice Department successfully argued to reverse this standard.[159] Given the change in stance the rule took, some might argue that Congress should have been more explicit with their repudiation of the rule.[160] Either way, the burden (at least for now) remains with the defendant.

It is this unsettled landscape of Rule 404(b) this Note is set in. It is the fear that the American justice system has far too many "Wesley McCoy's," and the fear they might not have a fair shake at trial. The forthcoming Part will expand upon West Virginia case law with an eye towards amending the Rules of Evidence.

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151 *See* Ordover, *supra* note 146, at 143.

152 *Id.*

153 *Id.*

154 Milich, *supra* note 145, at 778.

155 *See* Antonia M. Kopeć, *They Did It Before, They Must Have Done It Again; The Seventh Circuit's Propensity to Use a New Analysis of 404(b) Evidence*, 65 DEPAUL L. REV. 1055, 1070 (2015).

156 Milich, *supra* note 145, at 778.

157 *See The Need to Amend*, *supra* note 37, at 1483–85.

158 *Id.*

159 *Id.* at 1483.

160 *Id.*

III. ANALYSIS

Although the framework established by the Supreme Court of Appeals over 20 years ago remains intact, the question must be asked about whether this is a good thing. This Part will look to the future of Rule 404(b). More specifically, this Part will start off addressing how the rule could be modified to better address the concerns expressed by the Supreme Court of Appeals so many years ago in *McGinnis*.[161] Part III.A will explain why the time is ripe for the Court to reexamine the current state of Rule 404(b) and whether it is being used properly by courts. Part III.B will explain the method of effectuating possible changes to the Rule to better address the concerns so many have with the Rule's application. Part III.B will also discuss three options courts can take to make positive steps towards further developing how prior bad act evidence is treated in West Virginia and jurisdictions alike. All three of the suggestions, by themselves, ultimately create a more hardline rule for courts. These proposed amendments not only are more protective of a defendant's rights but are also rooted in familiar methodologies to mitigate mistreatment or misapplication. Additionally, the three proposed amendments all serve the same purpose: implementing a higher standard of scrutiny to prior bad act evidence.

A. Amend Rule 404(b): But Why Now?

Many commentators have urged that Rule 404(b) evidence should be held to a higher level of scrutiny before it can be admitted as evidence.[162] This argument rests on the idea, as Chief Justice Ketchum noted in *McCoy*, that prosecutors "deliberately introduce[] extrinsic crime evidence [often] for the sole purpose of prejudicing juries."[163] There can be no doubt that some jurors might disregard limiting instruction. No other explanation can account for the finding that "[o]nce the jury learns that the defendant has a criminal past, the odds of conviction skyrocket."[164] Despite instructions to limit the use of the prior bad act evidence for a specific purpose (such as motive, intent, plan), and only for that purpose without subscribing undue weight to the evidence, juries will continue to misuse prior bad act evidence. This extrinsic evidence, "although not offered to prove character, will require that the jury reason from character . . . to reach the non-character issue."[165] A call to amend Rule 404(b) is especially pressing in

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161 This concern, as shown throughout the remainder of this Note, is held by nearly every jurisdiction as Rule 404(b)'s biggest drawback.

162 *See* Ordover, *supra* note 146; *The Need to Amend*, *supra* note 37; Milich, *supra* note 145, at 781.

163 Ordover, *supra* note 146, at 146.

164 Milich, *supra* note 145, at 780.

165 Ordover, *supra* note 146, at 147.

light of these demonstrable prejudices to defendants, and the Chicago Jury Project only further supports that call to amend.

B. *Chicago Jury Project and its Effect on Prior Bad Act Jurisprudence*

In 1966, Harry Kalven and Hans Zeisel published their findings from the Chicago Jury Project in a book called *The American Jury*.[166] It was expected that their research would have a great impact on reforming many aspects of the criminal justice system. The following year, the Supreme Court decided *Spencer v. Texas*,[167] a case challenging the use of prior bad act evidence in the liability portion of a trial for charges brought under a habitual offender statute.[168] Much like "felon not to possess" cases, the trial is bifurcated into liability for the indicted charge, and if liability is found, the court holds the second portion of the trial to determine if the defendant is a habitual offender, and thus, subject to higher criminal penalties.[169] In upholding the use of the defendants prior criminal acts, the Court relied on the findings of the recently published *The American Jury*: "Indeed the most recent scholarly study of jury behavior does not sustain the premise that juries are especially prone to prejudice when prior-crime evidence is admitted as to credibility."[170] However, as the dissent exclaimed, the majority erroneously construed the findings in *The American Jury*.[171] A later edition of *The American Jury* later confirmed Chief Justice Warren's interpretation of the Chicago Jury Project and stated that the majority in *Spencer* was incorrect.[172] Rather, conviction rates were much higher when the jury knew of the defendant's prior criminal or bad acts.[173] This erroneous finding is said to have persisted throughout *Huddleston*.[174]

C. *A Look Back to McCoy: How Amending 404(b) Will Help*

In *McCoy*, the Trial Court admitted evidence so the jury could use the knowledge about the prior stabbing to show the defendant had the "ability to form the specific intent required to prove the charged offense of murder."[175] The

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166 *See* KALVEN, JR. & ZEISEL, *supra* note 40.

167 385 U.S. 554 (1997).

168 *Id.*

169 *Id.* at 556–57.

170 *Id.* at n.8.

171 *Id.* at 575 (Warren, C.J., dissenting).

172 KALVEN, JR. & ZEISEL, *supra* note 40, at vi.

173 *The Need to Amend*, *supra* note 37, at 1465.

174 Ordover, *supra* note 146, at 149.

175 State v. McCoy, No. 15-1142, 2016 WL 6651585, at *3 (W. Va. 2016).

prosecution offered the evidence of the prior bad act as evidence that McCoy "intended to respond to a fistfight with knife violence and that petitioner knew that using a knife under such circumstances could cause serious or deadly harm."[176]

Stepping back from the specific facts of *McCoy*, evidence that the defendant was involved in a prior stabbing could be used in several ways. First, if both occurrences were with the same individual, a court could find that the defendant had prior malice against another individual. Another way Rule 404(b) evidence could be used is to show that because the Defendant was involved in similar acts, the defendant intended to perform a particular act or to show the defendant acted absent a mistake.

However, when applying the specific facts of *McCoy*, the probative value of the similar act evidence is significantly diminished. First, the time between acts is approximately six years.[177] Next, although both prior bad acts involved McCoy's use of a knife in a stabbing, the inferences a jury could make are reduced because of the differences of the events. Police cleared McCoy of criminal liability in the 2008 altercation because it was found that McCoy had used his knife in self-defense.[178] The charged conduct, despite being argued by McCoy as self-defense, was portrayed by the prosecution as a first-degree murder case.[179] Revealing to a jury the facts behind a justified, self-defense incident in no way helps the prosecution show intent, motive, or any of the enumerated purposes.

As Chief Justice Ketchum noted, the two events had little in common, except that both were stabbings.[180] The evidence of the prior bad act of self-defense hypothetically infers no more than McCoy had at one time carried a knife and that had used one before. However, practically speaking, the evidence showed that McCoy had been involved in an altercation in which he brought out a knife and stabbed someone. This permits the jury to engage in an unfair picking and choosing when assigning weight of the evidence. This is exactly the concern many fear the introduction Rule 404(b) evidence fails to adequately address.[181] One commentator states that the ability of attorneys to "distinguish between the improper . . . purpose and the proper . . . purposes is frequently limited."[182]

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176 *Id.* at *4.

177 *See id.*

178 *Id.*

179 *See id.* at *1.

180 *See id.* at *6.

181 *See* State v. McGinnis, 455 S.E.2d 516, 527 (W. Va. 1994); Ordover, *supra* note 146, at 134–35; STEPHEN P. MEYER, TRIAL HANDBOOK FOR WEST VIRGINIA LAWYERS § 31:11 (2017–18 ed. 2017).

182 Ordover, *supra* note 146, at 135. In his article, he is referring to the improper purpose, that is "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character . . . to

Furthermore, he states that "[t]he ability of a jury to use evidence admitted under the Rule 404(b) exception for a proper purpose, at least in intent cases, is highly questionable."[183]

Here, the relevancy of the evidence is low because of the substantive differences between the two acts. Looking back to Rule 403, which states that a court should exclude evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[184] Applying this balancing test should have excluded the evidence because the low probative value would have been outweighed by the prejudicial value—knowledge that the defendant had gotten in an altercation that ended in a stabbing. If the prosecution wished to introduce evidence that McCoy carried a knife, evidence could have been introduced in a manner much less prejudicial than through prior bad act evidence.

To start, McCoy was claiming self-defense. This alone establishes that McCoy knew what kind of damage a knife could inflict by his carrying and ultimately use of the knife. Next, as one commentator suggests, the ability to use prior bad act evidence in intent cases is "highly questionable."[185] Finally, a jury could easily find that McCoy acted absent a mistake, again, by McCoy's use of the knife in self-defense. It is this situation this Note is intended to address; that is, provide a solution to better safeguard defendants from prior bad act evidence.

D. Reformation of the Rule

Well before *Huddleston* was decided, some have called to amend Rule 404(b) to better protect parties from misuse of prior bad act evidence.[186] When looking towards reform, commentators primarily identified three rules that could be amended or used to affect the admission of prior bad act evidence: Rule 104, Rule 403, and Rule 404(b).[187] Although there have been several ways to

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show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1). Further, the proper purpose being that "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2). The above quoted portions are identical to their West Virginia counterparts. *See* W. VA. R. EVID. 404(b)(1), (2).

183 Ordover, *supra* note 146, at 135–36. It is important to bring back up the purposes offered for using evidence of McCoy's prior bad act: "the ability to form the specific *intent* required to prove the charged offense of murder." State v. McCoy, No. 15-1142, 2016 WL 6651585, at *3 (W. Va. 2016) (emphasis added).

184 W. VA. R. EVID. 403.

185 Ordover, *supra* note 146, at 136.

186 *See The Need to Amend*, *supra* note 37.

187 *See id.*; Ordover, *supra* note 146; Milich, *supra* note 145.

implement this new standard, the logic behind its intention are all grounded behind similar concerns for misapplication and juror overvaluation.[188]

This Note is centered on West Virginian jurisprudence, a state that has held prior bad act evidence is subject to Rule 104(a)—meaning such evidence is subject to passing judicial scrutiny before passing forward to the jury. For further discussion and reasoning, see Part II and the accompanying cases.[189] As a result, addressing the arguments between using Rules 104(a) and 104(b) in any depth is beyond the scope of this Note.

Further, a change in how courts apply Rule 404(b) and address prior bad act evidence can be achieved in several ways. As some commentators have suggested, amending Rule 404(b) itself is the most direct way of achieving change. This seems like the most logically sound method because the amendment would not impact any other rules. However, some suggest looking farther than the confines of Rule 404(b). These suggestions propose that a heightened standard of scrutiny should be applied to prior bad act evidence than what Rule 403 provides.[190] This Note proposes the most efficient way to effectuate a change in how prior bad act evidence is used will consist of amending Rule 403.

1. Reverse Rule 403

The most direct way of changing how prior bad act evidence is treated in courts does not consist of making the majority of changes to Rule 404(b), but rather by amending Rule 403. Both federal courts and West Virginia utilize a "reverse Rule 403" standard.[191] This reverse Rule 403 standard is found in Rule 412 of both West Virginia Rules of Evidence and the Federal Rules of Evidence.[192] Rule 412 governs when a party may introduce evidence in a sex offense case of a victim's sexual behavior or sexual predisposition.[193] The risks in introducing evidence of the victim's prior sexual behavior or sexual predisposition are that the jury might consider such evidence to justify the actions of the defendant or in other words, "the victim was asking for it." Such inferences are dangerous to bring before the jury.

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188 *See* Milich, *supra* note 145, at 798.

189 *See supra* Part II.

190 *The Need to Amend*, *supra* note 37, at 1467; Franklin Cleckley & Marjorie McDiarmid, Commentary on the Proposed West Virginia Rules of Evidence (2014) (on file with author).

191 In West Virginia, the "reverse Rule 403" standard is utilized in Rule 412. W. VA. R. EVID. 412(b)(2) ("the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party").

192 FED. R. EVID. 412(b)(2); W. VA. R. EVID. 412 (b)(2).

193 *See, e.g.*, W. VA. R. EVID. 412(b)(2) ("the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party").

The reverse Rule 403 standard is also utilized in Rule 609 of the Federal Rules of Evidence.[194] Rule 609 governs when the prosecution may introduce evidence of a defendant's prior conviction for purposes of attacking the witness's character for truthfulness.[195] Typically, evidence of prior felony convictions are permitted to be introduced into evidence subject to Rule 403.[196] However, when more than 10 years have passed, the same convictions are subject to reverse Rule 403.[197] The reason for such is obvious. The rule intends to protect defendants from conduct so distant in relevance unless it absolutely must be considered.

Like using criminal convictions to impeach a witness, or using a victim's sexual behavior or sexual predisposition, using prior bad act evidence to show that a party could possess the intent, plan, or the other permitted purposes should be protected by the courts because of the same dangers this evidence can create. However, under the current standards, prior bad act evidence—which can include criminal convictions—is not held to the same heightened standard.

This Note proposes that Rule 403 could be amended, providing a separate section that would apply to Rule 404(b) evidence. West Virginia Rule of Evidence 403 states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[198] This amendment could be made by splitting Rule 403 into two sections: Rule 403(a) and Rule 403(b). Rule 403(a) would be verbatim to the current Rule 403. However, Rule 403(b) would adopt this reverse Rule 403 standard by requiring that evidence's probative value be substantially outweighed by its prejudicial value:

> **(b) Using Evidence of Prior Bad Acts and Convictions Against a Criminal Defendant.** This subdivision applies to all prior bad acts and criminal convictions. Such evidence may be admitted if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

By keeping this standard separate, Rule 404(b) could require that prior bad act evidence offered must first satisfy Rule 403(b) before a court should admit the evidence.

Furthermore, if Rule 403 was amended by creating two sections, like Rule 404(b), Rule 609 could be changed to include that evidence must meet the new reverse Rule 403 standard, now in the new Rule 403(b):

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194 *See* FED. R. EVID. 609(b)(2).

195 FED. R. EVID. 609(a).

196 *Id.*

197 FED. R. EVID. 609(b).

198 W. VA. R. EVID. 403. This language mirrors the language of Federal Rule of Evidence 403. *See* FED. R. EVID. 403.

> **(b) Limit on using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if the court determines, in the interests of justice, that:
> (1) is admissible under Rule 403(b); and
> (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

One benefit of changing Rule 403 is that Rules 609 and 404(b) would be utilizing the same exact standard and not simply identical or comparable language open for interpretation by courts.[199] This standard, now moved to Rule 403(b) would be familiar to all judges because of its use in Rule 609(b)(1). The result would be that all evidence of prior bad acts, criminal or not, must pass the heightened scrutiny of Rule 403(b). This would make solid steps forward to protect the party opposed to the evidence sought to be introduced. By requiring Rule 404(b) evidence to be subject to proposed Rule 403(b), the rule will be treated as a rule of exclusion, not inclusion.

Several benefits stem from creating rules of exclusion rather than creating rules of admission. First, a judge might have more peace of mind knowing prior bad act evidence was admitted only after the substantial evidence is offered to rebut the presumption of exclusion, and chances of an injustice occurring are greatly reduced. Another benefit of changing Rule 404(b) into a rule of exclusion is the presumption of innocence it offers the opponent of prior bad act evidence. Although many should agree that prior bad act evidence can be helpful for the court, the court should favor the presumption of innocence by giving every benefit to the opposed party, preventing prejudicial evidence to be properly screened. The presumption of innocence, in Rule 404(b) prior bad act evidence, will remain weak unless something is done to better protect parties. What benefit does a presumption of innocence have if it is "routinely trumped by even the weakest argument by the state for the admission of 404(b) evidence[?]"[200]

2. Amending Rule 404(b)

Another way to protect parties from introducing overly prejudicial prior bad act evidence is by going straight to the rule and amending it. The remaining

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199 *Compare* proposed Rule 403(b), *with* W. VA. R. EVID. 609(b).

200 *See* Milich, *supra* note 145, at 798. Milich seems to also view the need to amend Rule 404(b) as a way to also keep judges honest and fair themselves. He seems to believe that judges might be swayed by the prior bad act evidence in the same way that juries would. That is, a judge might be inclined to introduce the evidence because he or she affected by the propensity argument.

two methods of amending the Rules of Evidence reflect the least of amount of deviance from the rules as they are written. First, here is a brief look back to how Rule 404 is broken up. Rule 404 is divided into two sections: 404(a) and 404(b).[201] Rule 404(a) explicitly prohibits the use of character evidence, "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[202] The next clause states that "Exceptions for a Defendant or Victim in a Criminal Case" and then offers three exceptions to the prohibition.[203] The next section, Rule 404(b), governs "Crimes, Wrongs, or Other Acts."[204] Rule 404(b) starts off like 404(a) explicitly prohibiting "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[205] The next clause however, diverts from the framework in Rule 404(a) by stating permitted uses, and not providing exceptions to this rule.[206]

i. Exception for Criminal Cases

If, by amending Rule 403, creating two separate sections is viewed as too drastic of a move, the reverse Rule 403 standard can be included directly into Rule 404(b) without disturbing any other rule. In doing so, Rule 404(b) could be amended by conforming to Rule 404(a) by including an exception for criminal cases. Without having to change the listed "Permitted Uses" section, 404(b)(3) would provide "Exceptions for a Defendant in a Criminal Case." This exception would prevent the admission of prior bad act evidence without first requiring the prosecution to overcome a heighted burden of admissibility. Rule 404(b)(3):

> **(3) Exceptions for a Defendant in a Criminal Case.** In a criminal case, evidence of a crime, wrong, or other act shall only be admitted if the prosecution can prove that the probative value of the evidence substantially outweighs its prejudicial value.

By including a subsection (3) exception, the rule will show the importance of requiring a heightened standard for criminal defendants, while leaving the rule otherwise untouched for when either party wishes to introduce evidence of prior bad acts against anyone else.

Another benefit of amending the rules in this fashion is that it will not affect the application of any Rule of Evidence, while still being rooted in the

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201 *See* W. VA. R. EVID. 404.

202 W. VA. R. EVID. 404(a)(1).

203 W. VA. R. EVID. 404(a)(2).

204 W. VA. R. EVID. 404(b).

205 W. VA. R. EVID. 404(b)(1).

206 W. VA. R. EVID. 404(b)(2).

familiar principles of the reverse Rule 403 standard in Rule 609. Just like amending Rule 403, there would be no new standards courts would have to juggle within the years following the amendment. This existing familiarity is the most appealing aspect of amending the rules to incorporate a reverse Rule 403 standard.

ii. Prohibitive Purposes

Finally, Rule 404(b)(1) could be directly amended to require a heightened standard for all evidence offered under the rule. During the last public comment period for amendments to the West Virginia Rule of Evidence, Justice Cleckley joined Professor Marjorie McDiarmid in drafting proposed amendments to the rules.[207] Among those proposed amendments included adding a "Prohibited Uses" section to Rule 404(b):

> **Prohibited Uses.** [e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. *When evidence is offered, which is subject to this rule, there shall be a presumption that it is being offered for this prohibitive purpose.*[208]

Justice Cleckley's acknowledgement that Rule 404(b) needs amended should carry substantial consideration when determining whether Rule 404(b) should be amended. After all, it was Justice Cleckley that took the steps forward in protecting defendants when the United State Supreme Court would not.[209]

This proposed amendment would require that the proponent of any prior bad act evidence overcome the burden of proving that the evidence is not only being offered for a valid purpose, but that such evidence is not being offered as pretext for a prohibited purpose.[210] This method marks a distinct way of approaching prior bad act evidence—by stepping aside from the reverse Rule 403 language and providing a direct method of addressing prior bad act evidence. One drawback to this approach is the meshing of both an exclusionary rule and a qualifying clause that govern when the rule should apply. When read together, the added section which covers when evidence is offered seems out of place in the section governing prohibited uses.

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207 Cleckley & McDiarmid, *supra* note 190.

208 *Id.* (emphasis added). Many of their proposed amendments, including Rule 104(c)(1), Rule 408(2), and Rule 411, were adopted by the Supreme Court of Appeals for West Virginia. *Compare* Cleckley & McDiarmid, *supra* note 190, *with* W. VA. R. EVID. 104(c)(1), 408, 411.

209 *See* State v. McGinnis, 455 S.E.2d 516 (W. Va. 1994).

210 *See* Ordover, *supra* note 146, at 140–41; *The Need to Amend*, *supra* note 37, at 1487; Milich, *supra* note 145, at 797–98.

To address this concern, this "presumption" clause could be moved to a later section in the rule. Following a similar construction from above, adding a Rule 404(b)(3) section would be the most logical method of including this clause. Rule 404(b)(3) would read:

> **(3) Exceptions for a Defendant in a Criminal Case.** When evidence is offered, which is subject to this rule, there shall be a presumption that it is being offered for this prohibitive purpose.

Drafting the rule this way not only takes away plain language ambiguity, but it also allows a distinct subsection to Rule 404(b) evidence in a criminal trial—specifically governing the part of the rule that needs amending.

IV. CONCLUSION

Rule 404(b) and introducing prior bad act evidence has long been an area of concern. The time is now for the Supreme Court of Appeals of West Virginia to acknowledge that Rule 404(b) remains, to this date, the most litigated Rule of Evidence. Furthermore, the time is now for Rule 404(b) to be amended to reflect a rule that can better serve criminal defendants.

Concerns about how prior bad act evidence have been prevalent since before the Federal Rules of Evidence were promulgated.[211] Long before the enactment of the Federal Rules of Evidence and the Supreme Court's *Huddleston* decision, courts nationwide could not find a uniform method of applying the rule. Although the Supreme Court addressed the concerns associated with introducing evidence under Rule 404(b), the issue lies in several factors. The first concern with Rule 404(b) is there is great inconsistency in how the rule is applied among jurisdictions—even within the same jurisdiction.[212] The second concern is that states like West Virginia, who adopted a stricter test than that in *Huddleston*, are still faced with issues surrounding the rule. The need to amend Rule 404(b) seems as necessary as ever because even after introducing a stricter test, courts could not find consistency applying the rule.

In West Virginia, over 20 years of court opinions have neither helped defense attorneys predict when prior bad act evidence will be admissible, nor made any helpful steps in adding protections to defendants against the dangers of prior bad act evidence. The time is now that prior bad act evidence be reevaluated and amended to change how courts apply Rule 404(b) going forward. Looking to how the West Virginia Rules of Evidence could be amended to effectuate the desired result, three realistic options emerge for the courts to adopt—which fall back on one primary principle: Rule 404(b) evidence must be held to a higher standard of scrutiny.

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211 *See The Need to Amend, supra* note 37, at 1465.

212 *See "Where There's Smoke," supra* note 147.

First, the reverse Rule 403 standard could be implemented through a more substantive change to the Rule of Evidence. To properly make this change, Rules 403 and 404 would be amended. Rule 403 would be split up into two sections: Rules 403(a) and 403(b). Rule 403(a) would represent the traditional Rule 403 standard, and Rule 403(b) would represent the reverse Rule 403 standard, providing both 404 and 609 with a consistent hardline rule that can be applied uniformly.

Second, Rule 404(b) could be amended to include a third sub-section, Rule 404(b)(3), to provide that when prior bad act evidence is being offered against a criminal defendant, the court should only admit the evidence if the proponent can show that the evidence's probative value substantially outweighs the prejudicial value. This standard is used in Rule 609(b)(1) for when courts determine whether a prior criminal conviction should be introduced for impeachment. This reverse Rule 403 approach is appealing because of its familiarity among courts and would not likely lead to misinterpretation.

Finally, Rule 404(b) itself could be amended to include a prohibitive purposes clause. This section would provide that whenever prior bad act evidence is offered, the court should presume that the prior bad act evidence is being offered for one of the prohibited purposes. This change would be made through the same method, by creating a third section in 404(b) to include this clause.

By adopting a heightened standard of scrutiny for prior bad act evidence, West Virginia can set the bar for how all jurisdictions can protect defendants from the dangers of introducing prior bad act evidence. Clearly, the proposed amendments will not bar all prior bad act evidence from being introduced as this is not the intention of the proposed amendments. The intention is to provide an added layer of protection for people like Wesley McCoy—defendants labeled by their prior bad acts and unable to get a fair shake at trial. The time is now for Rule 404(b) to be amended.

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